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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAIME TORRES GARCIA, Defendant and Appellant.	A151478 (San Mateo County Super. Ct. No. SC046110B)

Defendant Jaime Torres Garcia appeals the denial of his motion to vacate his conviction pursuant to section 1473.7 of the Penal Code.[1] Garcia contends the trial court erred by finding his motion was not ripe under section 1473.7, subdivision (b), misinterpreting his claims, and rejecting his claim of ineffective assistance of counsel. We affirm the denial of his motion.

FACTUAL AND PROCEDURAL BACKGROUND

As relevant here, in 1999 Garcia and three codefendants were charged by information with one felony count of willfully and unlawfully possessing ephedrine or pseudoephedrine with intent to manufacture methamphetamine in violation of former Health and Safety Code section 11383, subdivision (c)(1).

The evidence at the preliminary hearing showed police caught Garcia and his co-defendants buying 300,000 pills of pseudoephedrine—a precursor in manufacturing methamphetamine—during a controlled buy. Garcia was arrested in the midst of loading

[1] All statutory references are to the Penal Code unless otherwise noted.

the pills into a car. The pills could have yielded about 39 pounds of methamphetamine, which would have a street value of around $3,000 to $8,000 per pound. Garcia told the police his role in the incident was to provide some of the money to buy the pills and to assist in moving the pills from the purchase site to another location. Garcia admitted he knew the pills would be used to make methamphetamine.

In January 2000, Garcia pled no contest to the count. Garcia signed a pre-printed plea form, as did his attorney at the time of the plea. His plea form contains the following typewritten statement: "I understand that if I am not a citizen, conviction of the offense for which I have been charged may have the consequences of deportation, exclusion from admission to the United States of [*sic*] denial of naturalization." Next to this typewritten statement is a handwritten interlineation that says, "denial citizenship status or amnesty," followed by initials of the trial judge. The trial court accepted the plea, suspended imposition of a sentence, and placed Garcia on probation for three years on conditions including that he serve one year in jail. Once Garcia completed his jail sentence, immigration authorities took him into custody, and he was voluntarily deported to Mexico based on his status as an undocumented alien, not his conviction. Garcia returned to the United States around 2005, and immigration authorities apprehended him in 2013, at which point he requested asylum. Garcia's appeal of the denial of that asylum application was pending in the United States Court of Appeals for the Ninth Circuit at the time the trial court denied Garcia's motion to vacate pursuant to section 1473.7, which is the focus of this appeal and is discussed below.

In January 2017, assisted by new counsel, Garcia filed a motion to vacate his conviction pursuant to section 1473.7. The motion argued counsel at the time of the plea (hereinafter "former counsel") provided ineffective assistance by failing to investigate and properly advise Garcia of the immigration consequences of his plea and by failing to negotiate a plea that would mitigate immigration consequences. Garcia submitted several declarations and letters to support that motion.

Among these is a declaration from Garcia himself, which included the following representations. Garcia was born in 1975 in Mexico, entered the United States in 1987,

and obtained permanent resident status in 1989. Garcia asserted he met with former counsel once. When Garcia asked about immigration consequences, former counsel told Garcia that he "might have problems in the future." Former counsel did not tell Garcia his conviction would constitute an "aggravated felony" for immigration purposes and did not advise him of the consequences of an "aggravated felony" conviction. Former counsel neglected to discuss other plea options to avoid or limit immigration consequences, and did not advise Garcia to talk to an immigration attorney prior to changing his plea. Garcia also did not remember the judge at the time of the plea verbally admonishing him about potential immigration consequences. Had Garcia known the conviction would be considered an "aggravated felony" for immigration purposes, he would not have taken a plea. Instead, he would have asked former counsel to negotiate a different plea, or insisted on going to trial, or agreed to spend additional time in custody.

Present counsel assisting with the motion to vacate (hereinafter "present counsel") also provided a declaration asserting, among other things, that she requested a transcript of Garcia's 2000 change of plea hearing but was told the notes had been destroyed after 10 years pursuant to the Government Code. No declaration from former counsel was submitted, though present counsel explained she was unable to locate former counsel's first name or former counsel himself.

The People opposed the section 1473.7 motion, and Garcia filed a reply accompanied by additional supporting documents. Garcia submitted a supplemental declaration indicating he did not actually have permanent resident status. Present counsel provided a supplemental declaration stating she obtained the full name of Garcia's former counsel from the district attorney and had found three attorneys licensed to practice law in California with the same name. One of the attorneys was deceased, and one denied ever working in San Mateo County or Northern California. Present counsel asserted the remaining attorney listed the "Utility Consumers' Action Network" in San Diego as his work address, but he had not responded to two voicemail messages she left for him on "the network's general voicemail."

On April 10, 2017, the trial court held a hearing on the section 1473.7 motion. Garcia testified he retained former counsel to represent him in his criminal case and met with former counsel once or twice, but former counsel never discussed Garcia's immigration background with him and never discussed any possible pleas other than the one Garcia took. Former counsel advised that Garcia "might have some immigration problems in the future," but former counsel did not go over the plea form with him, and just told him to sign it or else they would go to trial. Garcia could not recall if he read the plea form or if the judge at the time of the plea asked him whether he read or understood it. Garcia also stated his four children (ages 5, 17, 21, and 22), sisters, mother, and grandparents are all U.S. citizens.

Christopher Todd, an immigration attorney, testified at the hearing. Todd began practicing immigration law in 2002 and works primarily in the area of "deportation defense." In Todd's experience, he has never heard of a state district attorney's office that is completely unwilling to negotiate based on immigration consequences, but prosecutors are not always amenable to alternative plea bargains. Todd asserted he was "minimally" familiar with Garcia's case but, had he been consulted by defense counsel, a possible alternative plea to mitigate immigration consequences that "may or may not have been realistic" would be a plea to being an accessory (§ 32) to the charged offense. Other alternative pleas to avoid immigration consequences would have been a plea to money laundering (§ 186.10) or to transportation of a controlled substance without specifying the controlled substance (Health & Saf. Code, § 11352), or some combination of these.

At the hearing on the matter, the trial court expressed puzzlement at present counsel's inability to locate former counsel, stating it found former counsel's full name and California State Bar number in a section 995 motion in the trial file. Further, the court searched former counsel's State Bar number on the State Bar website and, in "15 seconds," found former counsel's contact information and that he was still actively practicing law in San Diego. Present counsel responded she did not get the section 995 motion when she requested the file, but she did try to call the attorney associated with

former counsel's State Bar number three times and sent one letter. Present counsel represented she never heard back from former counsel. The court also discussed the plea form, stating the interlineation adding to the immigration advisement was in the handwriting of the judge at the time of the plea, which the court recognized. The court asserted the interlineation suggested the prior judge "undertook some additional voir dire with regard to immigration consequences."

The trial court denied the motion by written order citing two grounds. First, the court concluded the motion was premature pursuant to section 1473.7, subdivision (b), because an appeal of "removal proceedings" based on the 2000 conviction was pending in the Ninth Circuit. Second, the court found Garcia failed to carry his burden of proving his claim of ineffective assistance by a preponderance of the evidence. With regard to former counsel's alleged failure to negotiate a plea that would mitigate immigration consequences, the court elaborated that Garcia failed to support the claim. Garcia presented no evidence from former counsel, either by declaration or live testimony. Further, the court stated that the underlying court file showed a joint conference was held on January 10, 2000, at which the prior judge and counsel for the parties discussed the relative culpability of the four defendants. The case against one defendant was then dismissed, and the charge was reduced to a non-aggravated felony for another defendant. Based on this record, the court found it "likely" that a mitigated resolution as to Garcia also was "presented to and discussed" with the prior judge, but "ultimately was rejected." In the court's view, "[t]his factual finding contradicts [Garcia's] claim." Garcia timely appealed. (§ 1473.7, subd. (f).)

DISCUSSION

Section 1473.7, which became effective January 1, 2017, allows "[a] person no longer imprisoned or restrained" to "prosecute a motion to vacate a conviction" if the conviction was legally invalid "due to a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere." (§ 1473.7, subd. (a)(1).) "Ineffective assistance of counsel that damages a defendant's

ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7." (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75 (*Ogunmowo*).)

There are two elements for demonstrating ineffective assistance of counsel: first, a defendant must demonstrate that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and second, the defendant must establish he or she was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *Ogunmowo, supra,* 23 Cal.App.5th at p. 75.) This test is disjunctive and if a defendant fails to show either element, the ineffective assistance claim fails. (*Strickland, supra,* 466 U.S. at p. 697.) To obtain relief pursuant to section 1473.7, the defendant carries the burden of establishing ineffective assistance by a preponderance of the evidence. (§ 1473.7, subd. (e).)

We exercise our independent judgment in deciding whether the facts demonstrate deficient performance and resulting prejudice to a defendant, but we accord deference to the trial court's factual determinations if supported by substantial evidence.[2] (*Ogunmowo, supra*, 23 Cal.App.5th at p. 76; *People v. Olvera* (2018) 24 Cal.App.5th 1112, 1116 (*Olvera*); *People v. Tapia* (2018) 26 Cal.App.5th 942, 950; cf. *In re Resendiz* (2001) 25 Cal.4th 230, 248, abrogated in part on other grounds in *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*).)

At the outset, we reject Garcia's contention that the trial court misinterpreted his claims as being limited to the issue of whether former counsel performed deficiently by failing to negotiate a plea that would mitigate his immigration consequences. Although the trial court gave a detailed rationale for rejecting the ineffective assistance claim based

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[2] Garcia asserts the appropriate standard of review is for abuse of discretion, but we agree with the cases cited herein that the independent review standard applies.

on that particular alleged failure, that circumstance does not establish any misunderstanding of Garcia's claims. Nothing else in the record supports Garcia's contention. (Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"].)

With regard to the merits, Garcia argues the trial court erred in denying his section 1473.7 motion because former counsel did not properly investigate and advise him of his immigration consequences, and because former counsel failed to negotiate an alternative plea mitigating immigration consequences.

"An allegation that trial counsel failed to properly advise a defendant is meaningless unless there is objective corroborating evidence supporting appellant's claimed failures. . . . [T]he 'easy' claim that counsel gave inaccurate information further requires corroboration and objective evidence because a declaration by defendant is suspect by itself. The fact is courts should not disturb a plea merely because of subsequent assertions by a defendant claiming his lawyer was deficient. The reviewing court should also assess additional contemporaneous evidence." (*People v. Cruz-Lopez* (2018) 27 Cal.App.5th 212, 223–224.) Here, the only evidence presented concerning what former counsel did or failed to do in the underlying criminal proceedings were Garcia's self-serving declarations and his self-serving testimony at the April 10, 2017 hearing. Garcia presented no corroborating evidence from former counsel or from the deputy district attorney who prosecuted his criminal case, and no evidence that either of the two was unable or unwilling to provide a declaration or testify. Garcia's attorney for the section 1473.7 motion indicated she tried to contact former counsel by phone and with a letter but was unsuccessful, however, it is unclear from the record whether former counsel had knowledge of or received any of these attempted communications.[3]

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[3] We note the parties disagree about whether the standards of criminal defense representation in 1999 and 2000 required former counsel to investigate and advise Garcia of immigration consequences. The People correctly point out the holding in *Padilla*—the case in which the United States Supreme Court recognized a Sixth Amendment duty to advise about immigration consequences—is not retroactive. (See *Padilla, supra,* 559 U.S. at p. 369; *Chaidez v. United States* (2013) 568 U.S. 342, 357–358.) However,

Additionally, neither of Garcia's declarations nor his hearing testimony shows he had any personal knowledge of what former counsel did or failed to do as far as investigating or negotiating for viable immigration-safe plea options. (Evid. Code, § 702 ["[T]he testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter"].) Garcia's declaration merely states he and former counsel "never discussed any alternate plea options," and his hearing testimony was the same.

Further, the record belies Garcia's claims of error. The record shows Garcia signed the plea form, which stated he was advised and understood that his plea could have certain immigration consequences. Former counsel also signed the plea form, which stated that he personally read and explained its contents to Garcia. Next to the typewritten immigration advisement in the plea form is a handwritten interlineation that says, "denial citizenship status or amnesty," which suggested to the trial court that the judge in the prior proceedings undertook some additional voir dire regarding immigration consequences. Moreover, on its review of the court file, the court issued an order reflecting that Garcia entered this plea after the judge that took the plea and the attorneys for the parties held a joint hearing wherein the relative culpability of the four defendants was considered, as well as mitigated resolutions for the defendants. Noting that one of Garcia's codefendants had the case against him dismissed and another codefendant's charge was reduced to a non-aggravated felony, the court found there likely was consideration, but ultimately a rejection, of a resolution for Garcia that was more lenient than what he ultimately received.

Garcia points to pre-*Padilla* California decisional authority recognizing a duty to advise regarding immigration consequences, and to try to negotiate a plea with mitigated immigration consequences. (*People v. Soriano* (1987) 194 Cal.App.3d 1470; *People v. Barocio* (1989) 216 Cal.App.3d 99; *In re Resendiz*, *supra*, 25 Cal.4th 230; *People v. Bautista* (2004) 115 Cal.App.4th 229.) We need not express an opinion on the issue because, whatever professional norms former counsel operated under in 1999 and 2000, Garcia failed to establish any violation by former counsel.

Based on this record, we conclude the trial court did not err in deciding that Garcia failed to establish deficient performance by former counsel. In reaching this conclusion, we accord deference to the trial court's implicit decision not to credit Garcia's live testimony.

Garcia contends the fact the original court notes and file are silent as to discussions about immigration consequences, when combined with his evidence that potential alternate plea options were available, "supports the finding that [former counsel] failed to consider alternate felony pleas . . . because he was ignorant as to the actual immigration consequences and was unaware that alternate non-deportable pleas existed." We are not persuaded. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (*Strickland*, *supra*, 466 U.S. at p. 690.) Final judgments are presumed valid, and when a final judgment is being collaterally attacked, " 'all presumptions favor the truth, accuracy, and fairness of the conviction and sentence . . . .' " (*People v. Duvall* (1995) 9 Cal.4th 464, 474; accord, *Turner v. Calderon* (9th Cir. 2002) 281 F.3d 851, 881 [" '[s]elf-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded state convictions' "].) Garcia's showing was insufficient to overcome these presumptions.

In any event, Garcia cannot prevail in his appeal without establishing prejudice from former counsel's alleged deficiencies. To show prejudice, a defendant bears the burden of showing by a preponderance of the evidence that he or she would not have entered the plea bargain. (*Ogunmowo*, *supra*, 23 Cal.App.5th at p. 78; *People v. Martinez* (2013) 57 Cal.4th 555, 567 (*Martinez*).) However, "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." (*Lee v. United States* (2017) 137 S.Ct. 1958, 1967 (*Lee*); *In re Alvernaz* (1992) 2 Cal.4th 924, 938 ["[A] defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted a proffered plea bargain, is

insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims"].)

Here, other than self-serving assertions in his declarations and at the hearing on the motion, Garcia presented no contemporaneous evidence substantiating that, but for former counsel's alleged deficient performance, he would have rejected the plea and proceeded to trial. Garcia testified that at the time he changed his plea, former counsel told him he might have immigration problems in the future. Significantly, however, Garcia acknowledged he never asked former counsel about this further, suggesting immigration consequences were not a primary consideration for him at the time. In fact, the record indicates Garcia did nothing to address his immigration status until 2013 when he applied for asylum after immigration authorities apprehended him. Moreover, Garcia was caught red-handed loading an enormous quantity of pseudoephedrine into a car, and he admitted to the police that he knew the pills would be used to make methamphetamine. As noted, Garcia's plea resulted in suspension of imposition of a sentence and placement of Garcia on probation for three years on conditions including that he serve one year in jail. Inasmuch as the evidence against Garcia was strong, and his maximum exposure had he been convicted at trial was six years in prison, his self-serving statements that he would have rejected the plea and the lenient disposition he obtained are unconvincing. (See *Lee*, *supra*, 137 S.Ct. at p. 1966 ["A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial"].)

Finally, Garcia's claim of a viable alternative plea bargain with mitigated immigration consequences lacks support in the record. (See *Olvera*, *supra*, 24 Cal.App.5th at p. 1118 [rejecting ineffective assistance claim where defendant failed to "identify any immigration-neutral disposition *to which the prosecutor was reasonably likely to agree*"], italics added.) While immigration attorney Christopher Todd testified at the hearing he had never heard of a district attorney's office that is completely

unwilling to negotiate based on immigration consequences, Todd also acknowledged that (1) prosecutors are not always amenable to alternative plea bargains; (2) one of the possible alternative pleas Todd suggested "may or may not have been realistic"; and (3) Todd was only "minimally" familiar with Garcia's criminal case. (*Martinez*, *supra*, 57 Cal.4th at p. 568 ["That the defendant would have . . . [rejected the plea bargain] is not established by evidence that . . . an immigration-neutral bargain was possible"].) On this record, it is pure speculation that an alternative plea with mitigated immigration consequences could have been negotiated.

In sum, we conclude the trial court properly denied Garcia's motion to vacate his conviction.[4]

DISPOSITION

The order is affirmed.

[4] Because we affirm the order on the foregoing grounds, we need not and do not address whether Garcia's section 1473.7 motion was improperly denied for being premature under section 1473.7, subdivision (b).

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Fujisaki, J.

We concur:

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Siggins, P.J.

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Jenkins, J.

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